

1994

Hansen v. Industrial Commission of Utah : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Alan L. Hennebold; Erie V. Boorman; Frank M. Nakamura; Attorneys.

Virginius Dabney; Dabney & Dabney; Attorney for Petitioner.

Recommended Citation

Legal Brief, *Hansen v. Industrial Commission of Utah*, No. 940349 (Utah Court of Appeals, 1994).
https://digitalcommons.law.byu.edu/byu_ca1/5994

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

=====

UTAH COURT OF APPEALS

=====

GERALD R. HANSEN,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF UTAH,
SALT LAKE CITY CORPORATION and the
EMPLOYER'S REINSURANCE FUND,

Respondents.

=====

:
:
:
:
:
:
:
:
:
:
:

Case No. 940349 CA

Priority No. 7

P E T I T I O N F O R R E H E A R I N G

PETITION FOR REVIEW OF

DENIAL OF PETITIONER'S MOTION FOR REVIEW OF

ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

Alan L. Hennebold, Esq.
UTAH INDUSTRIAL COMMISSION
P.O. Box 146610
Salt Lake City, Utah 84114-6610
Attorney for Industrial
Commission of Utah

Virginus Dabney, Esq.
DABNEY & DABNEY, p.c.
350 South 400 East, Suite 202
Salt Lake City, Utah 84111
Attorney for Petitioner

Erie V. Boorman, Esq.
EMPLOYERS' REINSURANCE FUND
Post Office Box 146611
Salt Lake City, Utah 84114-6611
Attorney for Employers'
Reinsurance Fund

Frank M. Nakamura, Esq.
Assistant City Attorney
451 South State Suite 505
Salt Lake City, UT 84111
Attorney for Salt Lake City Corporation

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCKET NO.
K F
50
A10

DOCKET NO.

940349

FILED

JUL 06 1995

COURT OF APPEALS

COMES NOW Petitioner pursuant to Rule 35 of the Utah Rules of Appellate Procedure, inter alia, and moves this Court for an Order Rehearing the above entitled matter. The basis for this motion is as follows:

STATEMENT OF FACTS

1. On May 21, 1976 Mr. Hansen sustained injuries to his left knee and right foot at work while unloading a crate of glass which tipped over and fell on him. (R. at 3) The Employer, Salt Lake City Corporation, acknowledged legal and medical causation, and paid both temporary, total and permanent, partial disability compensation benefits to Mr. Hansen through January 1983, and has continued to pay for his medical care and treatment, including prescriptions, since then. (R. at 84)

2. Subsequently, on November 16, 1990 Mr. Hansen filed a claim for permanent, total disability compensation. (R. at 34). The Administrative Law Judge referred this matter to a Medical Panel which found that Mr. Hansen had a 70% (whole person) permanent, partial impairment of which 16% was exclusively attributed to the 1976 industrial accident. (R. at 110-126, 129-130) No party objected to the medical findings of the Medical Panel report. Respondents did not present evidence at the hearing regarding Mr. Hansen's ability to work and waived referral for a determination regarding his vocational rehabilitation potential, essentially stipulating to his unemployability. (R. at 149).

3. On March 18, 1993 the Administrative Law Judge adopted the Medical Panel's findings as her own, and concluded that "The preponderance of the evidence shows that Mr. Hansen has been disabled since the date of his industrial injury, May

21, 1976 to the present." (R. at 193) She ordered the payment of permanent, total disability compensation benefits to Mr. Hansen. (R. at 170-196)

4. Respondent Salt Lake City Corporation filed a Motion for Review with the Industrial Commission (R. at 201-220) which on May 13, 1994 entered an Order entitled "Order Denying Motion for Review" although the substance of the Order indicated, in fact, that the Motion for Review had been granted. In doing so, the Industrial Commission adopted all of the findings of the Administrative Law Judge, but reversed the Administrative Law Judge's conclusion that Mr. Hansen's 1976 industrial accident caused him to be permanently and totally disabled. (R. at 260-263).

5. The Industrial Commission in its Order Denying Motion for Review adopted, without modification, all of the Findings of Fact of the Administrative Law Judge. Although the Industrial Commission's Order contained a section entitled "Discussion and Conclusions of Law", a review of that portion of the Order discloses that there is not a single, true Conclusion of Law contained in it. (R. at 260-263) The Commission merely speculates that there may be another cause of Mr. Hansen's unemployability, but does not succinctly identify or logically analyze what evidence exists to support that suspicion.

6. The Industrial Commission in reversing the Order of the Administrative Law Judge, did not identify "medical causation" as an issue, did not refer to it in its decision, and did not deny the claim on that basis. Indeed, as indicated below, the

Industrial Commission adopted the Administrative Law Judge's Findings of Fact, including those relating to legal and medical causation!

7. Only Mr. Hansen filed a Petition for Review of the Industrial Commission's Order. The Respondents neither filed a cross-appeal, nor designated any additional issues to be considered on appeal. Mr. Hansen in his Petition for Review, Docketing Statement and other supporting documents, never raised the issue of medical causation. Because it was not an issue upon which the Industrial Commission decided its Order. The Industrial Commission does not even use the phrase "medical causation" in its Order.

8. On March 14, 1995, Petitioner filed a Motion to Strike Respondents' Briefs as they raised the issue of "medical causation" for this first time on Appeal.

9. On April 6, 1995 this Court entered an Order on that Motion stating as follows:

IT IS HEREBY ORDERED that the motion to strike respondents' briefs is denied. In so ordering, the court intimates no view on the propriety, relevance or persuasiveness of respondents' briefs, and the petitioner is in no way foreclosed from renewing his arguments about respondents' briefs in his reply brief. This order is without prejudice to the prerogative of the panel to whom this case is assigned for decision on the merits to strike any brief or call for further briefing.

10. On June 22, 1995 this Court entered a Memorandum Decision in this matter which stated in full as follows:

We affirm for the reasons stated in respondents' briefs. We conclude that Zupon v. Industrial Commission, 860 P.2d 960 (Utah App. 1993), is controlling precedent. (Footnote omitted).

ARGUMENT

THE RELEVANCE OF ZUPON V. INDUSTRIAL COMMISSION, 860 P.2d 960 (UTAH APP. 1993) TO THIS MATTER HAS BEEN MISAPPREHENDED.

This Court affirmed the Industrial Commission's denial of workers compensation benefits to Mr. Hansen on the basis that Zupon v. Industrial Commission, 860 P.2d 960 (Utah App. 1993) is controlling precedent. All of the parties agree that Zupon stands for the proposition that medical causation is a question of fact. But in this case, it was an issue that was conclusively established below and not raised until Respondents filed their Briefs on appeal.

In this matter, the Medical Panel appointed by the Administrative Law Judge found the existence of medical causation (R. at 110-126, 129-130). None of the parties objected to the medical findings of the Medical Panel report.

On March 18, 1993 the Administrative Law Judge adopted the Medical Panel's findings as her own, and concluded that "The preponderance of the evidence shows that Mr. Hansen has been disabled since the date of his industrial injury, May 21, 1976 to the present." (R. at 193). She ordered the payment of permanent, total disability compensation benefits to Mr. Hansen. (R. at 170-196).

On May 13, 1994, the Utah Industrial Commission entered an Order entitled "Order Denying Motion for Review" which specifically adopted all of the findings of the Administrative Law Judge, but reversed the Administrative Law Judge's Conclusion of Law that Mr. Hansen's 1976 industrial accident caused him to be permanently and totally disabled. (R. at 260-263). In it, the Commission merely speculates that there may be another cause of Mr. Hansen's unemployability, but does

not succinctly identify or logically analyze what evidence exists to support that suspicion. The full text of the Industrial Commission's Order is attached hereto as Exhibit A.

In short, to the extent that Zupon has application to this case, its controlling precedent is that the Medical Panel, Administrative Law Judge and the Industrial Commission's finding of fact that medical causation exists should be upheld. It is not a basis upon which to affirm the Industrial Commission's Order, but rather the basis for overturning it.

II

THE ISSUE OF MEDICAL CAUSATION IS A NEW ISSUE ON APPEAL

The law is well established that one cannot raise for the first time a new issue on appeal. State v. Brown, 856 P.2d 358, 359-60 (Utah App. 1993). However, that is exactly what the Respondents have done here. They have not chosen to defend the Industrial Commission's Order on the basis upon which it was decided, but have rather addressed an entirely new basis in order to support their position.

Unfortunately for them, however, the Industrial Commission specifically adopted all of the findings of the Administrative Law Judge. There are no findings of the Administrative Law Judge which can be marshaled which would support a finding of a lack of medical causation. In fact, the Administrative Law Judge's findings all support rather than undermine such a finding, as further evidenced by the specific finding of fact which the Industrial Commission fully adopted "... that the primary cause of the applicant's disability during the past 16 years has been the left knee and

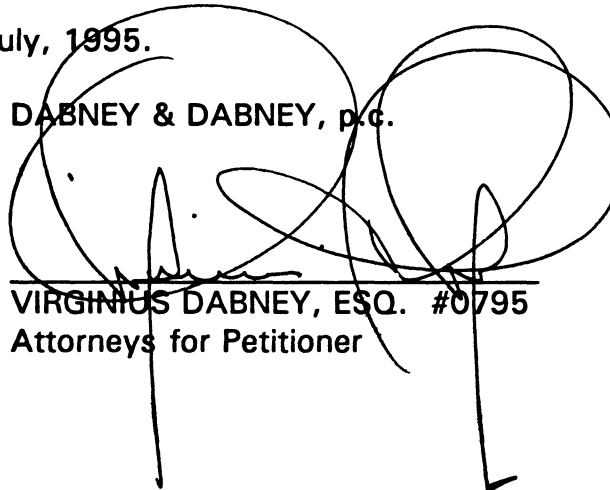
right ankle impairment sustained in the May 21, 1976 industrial accident." (R. at 194) [emphasis added]

All of the arguments of the Respondents regarding "medical causation" (the only issue raised in their Briefs) are irrelevant and immaterial since they do not address the real issue on appeal. In addition, and in fact, no argument whatsoever is advanced in either Brief which in any meaningful way defends the Industrial Commission's Order. See Point III of Petitioner's Brief. Therefore, their Briefs should be stricken as non-responsive and immaterial.

WHEREFORE, Petitioner respectfully moves that this Court grant the Petition of Rehearing and allow oral argument on this important matter.

DATED this 6th day of July, 1995.

DABNEY & DABNEY, p.c.



VIRGINIUS DABNEY, ESQ. #0795
Attorneys for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of July, 1995, a copy of the foregoing was mailed, postage prepaid, to the following:

UTAH COURT OF APPEALS (1 original & 6 copies)
400 Midtown Plaza
230 South 500 East, Suite 400
Salt Lake City, Utah 84102

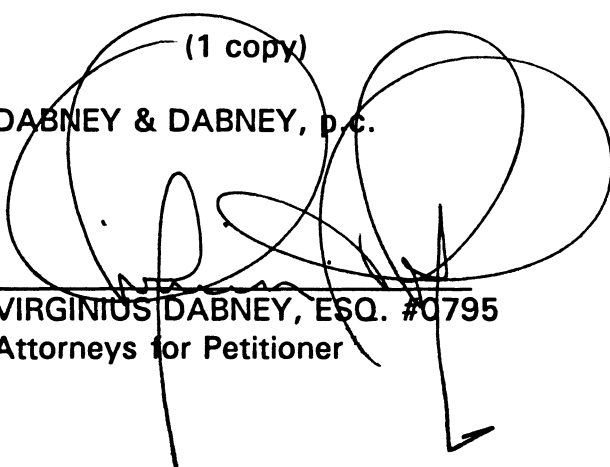
Alan L. Hennebold, Esq. (2 copies)
INDUSTRIAL COMMISSION OF UTAH
Post Office Box 146610
Salt Lake City, Utah 84114-6610

Erie V. Boorman, Esq. (2 copies)
EMPLOYERS' REINSURANCE FUND
Post Office Box 146611
Salt Lake City, Utah 84114-6611

Frank M. Nakamura, Esq. (2 copies)
Assistant City Attorney
451 South State, Suite 505
Salt Lake City, Utah 84111

Mr. Gerald R. Hansen (1 copy)
1885 West Bowling Avenue
Salt Lake City, Utah 84119

File

(1 copy)
DABNEY & DABNEY, P.C.

VIRGINIUS DABNEY, ESQ. #0795
Attorneys for Petitioner